No. 139.

Brief of Camp for Appellees.

Filed Nov. 26, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 139.

EDWIN H. McHENRY AND FRANK G. BIGELOW AS RECEIVERS OF THE PROPERTY OF THE NORTHERN PACIFIC RAILROAD COMPANY, APPELLANTS,

vs.

LORE ALFORD, J. C. GATES, A. D. STEPHENS, SUMNER R. CLARKE AND D. C. LAKE, APPELLEES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEES.

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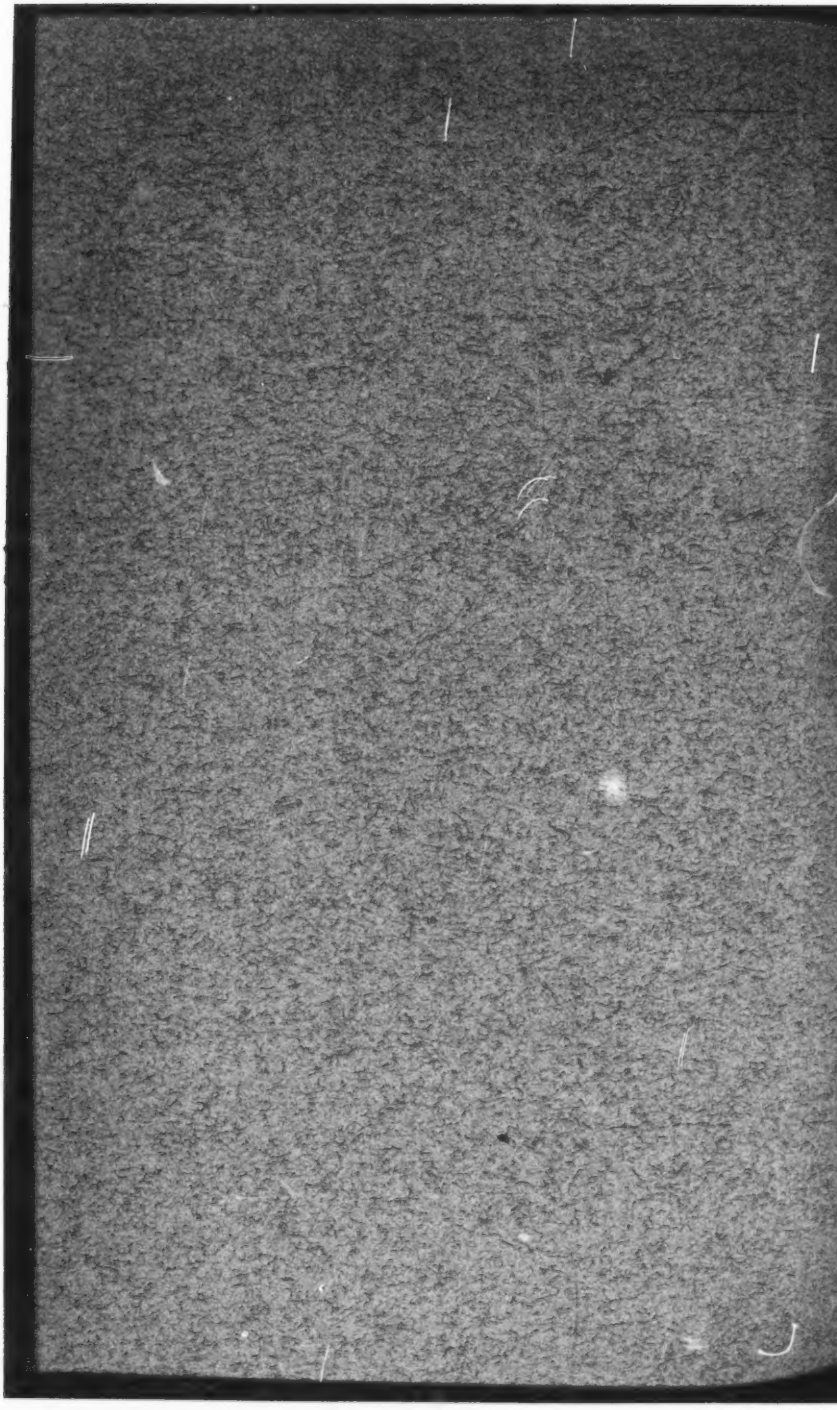

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The Six Questions Certified to this Court will be Considered in this Brief in their order.

FIRST.

HAD THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF NORTH DAKOTA JURISDICTION TO HEAR AND DECIDE SAID CASE?

Either in copying the petition for removal or in printing the transcript an error has been made; the words "and a citizen of" have been omitted from the printed record after the word "of" near the end of the seventh line from the bottom of the second page of the printed record. The petition stated both the residence and citizenship of Henry C. Rouse, just as it appears by the transcript to show that of the other plaintiffs.

The proceedings for the removal of this case from the State to the federal court were based on diverse citizenship and a separable controversy. The same rule should be applicable to receivers as to executors, namely that their citizenship and not the place of their appointment determines the right of removal. But if otherwise, then the receivers were shown by the record to be acting under orders of the Circuit Court of the United States for the District of North Dakota. (The complaint filed in the State court contained substantially the same allegations which are set out in the amended bill filed in the federal court (Transcript, folio 2); the allegations as to the appointment of the receivers appear in the transcript at folios 15 and 16, page 11). And the petition for removal stated that the petitioner was a citizen of Illinois.

If any defects existed in the proceeding to remove, the plaintiffs, by not moving to remand, waived any objection which they might have made.

Gerling *v.* B. & O. R. R. Co., 151 U. S., 673.

It appears that the cause might have been begun in the federal court, and so it will not be remanded by an appellate court for reasons first urged in that court.

Gerling *v.* B. & O. R. R. Co., *supra*;
Bank *v.* Winslow, 102 U. S., 256;
Removal Cases, 101 U. S., 457.

But certainly the receivers appointed by the federal court might have sued in that court; might even have been required by that court to sue therein. In fact, after the cause was removed an amended bill was filed omitting all defendants except those represented by counsel for the petitioner for removal. So that all questions as to the separability of the controversy were eliminated. And the federal court proceeded to hear and determine a cause confessedly within its jurisdiction.

SECOND.

WERE OR WERE NOT THE LANDS DESCRIBED IN THE BILL OF COMPLAINT SUBJECT TO TAXATION UNDER THE LAWS OF THE TERRITORY OF DAKOTA IN THE YEAR 1888, BY REASON OF THE FACTS STATED IN THE BILL OF COMPLAINT RESPECTING THE CONDITION OF THE TITLE THEREOF?

The facts referred to are these:

The grant of lands to the Northern Pacific Railroad Company included all odd sections within forty miles of the line of definite location, excepting mineral lands and lands reserved, sold, granted, or otherwise appropriated, and those subject to prior valid pre-emption or other claims or rights. The lands involved are within the forty-mile limit; are odd sections. At the time of filing map of definite location they had not been reserved, sold, granted, or otherwise appropriated, and up to that time there had been no filings, entries, or applications to make filings or entries for any of them. Prior to 1888 the lands were surveyed by the United States, and by the surveyors reported to be non-mineral. After the road had been built and before 1888 the railroad company prepared in due form and filed in the local land offices lists of lands claimed by it under the grant, including all lands here involved and paid the lawful fees for such filings. The officers of the United States thereupon proceeded to examine the lands and adjust the grant and to determine if any of the lands were mineral or were for any other reason excepted from the grant. Such examination is not yet completed so far as it relates to the lands described in Schedule "A" annexed to the bill, and the officers have not yet determined whether or not for any reason those lands are excepted from the grant. That in 1892 the officers did decide that the lands described in

Schedule "B" annexed to the bill had been granted to the company and so patented those lands. After the filing of those lists in the land offices, and before 1888, the United States set up a claim adverse to the company to all the lands involved; and questioned and contested the company's claim, and that contest was pending when the tax proceedings here sought to be set aside were had. That contest was over questions of fact, and none of the lands were certified or patented to the company till after the lands had been sold for said taxes, until after which time the United States asserted a "potential claim" to the lands by reason of the non-identification thereof as part of the granted lands. This Court has held that until patents have been issued lands within the limits of this company's grant are open to appropriation under the laws relating to mineral claims. The orators believe that some of the lands described in Schedule "A" will be determined to be mineral or not free from pre-emption or other claims or rights, and so excluded from the grant. But the orators cannot say what particular tracts will be held to be so excluded. The delay in identifying and segregating the granted lands is not due to any act or omission of the company or the receivers. (See Transcript, folios 9 to 13.)

The plaintiffs assert the non-taxability of their lands upon two grounds. First, that it is not certain that the lands are free from "pre-emption or other claims or rights at the time of the grant." Second, that it is not certain that the lands are non-mineral. And that the Government was investigating these matters when the taxes in question were levied.

Facts, of which the court will take judicial notice, show that the lands were free from claims and rights.

It is a fact, ascertainable from published public records and documents, that until after the filing by the company of its map of definite location of its route opposite these lands all of them continued to be Indian country and not open to settlement or claim by whites.

Buttz *v.* Northern Pacific Railroad Company, 119 U. S., 55;
Report of Commissioner of G. L. O. 1881, p. 182.

And the Buttz case holds that none of the lands lying (as do those in question) between the James and Red Rivers within the limits of the grant, were open to entry at the Land Office until after the filing of said map. The first surveys of lands within the limits of North Dakota seem to have been made in 1871.

Report of the Commissioner of the G. L. O., 1871, p. 111.

But the plats were not filed nor the land open to entry until 1872.

(See Buttz case.)

None of the lands mentioned in the complaint were surveyed until after the filing of said map. Then, since the lands east of the James River were Indian lands when the map was filed, they were free from pre-emption or other claims or rights at that time.

(See Buttz case.)

And also because none of the lands here involved were then surveyed, they must have been free from pre-emption or other claims.

(Buxton *v.* Travers, 130 U. S., 232.)

The Railroad Company has enjoyed and asserted possession and ownership too long to deny now the taxability of the lands.

It is well known that the Northern Pacific Railroad Company has brought ejectment for lands in North Dakota; one instance being the case of—

Butz *v.* N. P. R. R. Co., 119 U. S., 55.

See also—

Salt Co. *v.* Tarpey, 142 U. S., 241;
St. P. & P. R. Co. *v.* N. P. R. Co., 139 U. S., 1;
Whitney *v.* Taylor, 158 U. S., 85;
S. P. Ry. Co. *v.* Whitaker, 109 Cal., 26;
N. P. *v.* Musser, 68 Fed., 993.

It appears from the bill in this suit that the Northern Pacific Railroad Company has three times at least mortgaged these very lands. (Transcript, folios 14 and 15.)

The grant conveys sufficient title to specific tracts to protect the company against an action for cutting timber.

U. S. *v.* N. P., 67 Fed., 890;
U. S. *v.* N. P., 152 U. S., 285.

It thus appears that the railroad company has for years asserted and maintained title to these lands, and claims to be "the owner of the absolute title * * * for every purpose except as to the right of taxation by the States."

N. P. *v.* Wright, 54 Fed., 67; S. C., 51 Fed., 68; Opinion of Judge Knowles.

The pendency of a dispute in the Land Office over these lands does not render them non-taxable.

It is well established that after a pre-emptor or homesteader has done everything which the law requires to make an entry of public lands, they become then taxable as his property. It is true that his entry may subsequently be cancelled by acts of the General Land Office, and in that event the taxes which have been levied, and any tax deeds which have been issued upon such lands would be void, but

could he, because, upon the suggestion of some adverse claimant, the United States Government was investigating and questioning his right to the land, obtain an injunction against the sale of the land for taxes, or avoid taxes which had been levied upon the land?

Supposing that after patents have been issued to this company, the United States sues to set aside such patents on the ground of mistake, and in such proceeding, whether by notice of *lis pendens* or by notice which the filing of the bill would give in law, or by a restraining order, hinders or stops the company from disposing of the lands, and from enjoying the lands in any way. During the ten or a dozen years that such a suit might be pending could the railroad company successfully contend that the lands were not taxable because the United States was claiming adverse title to them? What difference does it make whether it is the United States which is claiming adverse title or Smith or Jones? The railroad company is in no more danger of paying taxes on property which it does not own in the one case than in the other.

Supposing that instead of the United States as the adverse claimant, we take such a case as is familiar to those who have been engaged in the land-office business, viz: a settler claiming a right of entry on lands which he asserts were included within the Military Reservation at the time of the definite location of the road. Now, in such a case, the railroad company claims title under its grant. The settler, instead of the United States, claims that the land was excluded from the grant and open to his entry. The settler's entry is allowed in the district office and his final receipt issued to him in due course. Can it be that the railroad company could successfully assert the non-taxability of such tracts of land on the ground simply that title was in controversy before the United States Interior Department?

The principle underlying this branch of the case is well stated in—

Robinson *v.* Garr, 6 Cal., 273;
Witherspoon *v.* Duncan, 4 Wall., 210.

Congress has declared and made the lands taxable.

The Act of Congress, 24 Stat. Large, p. 143, provides—

> "That no lands granted to any railroad corporation by Act of Congress shall be exempt from taxation by States, Territories and municipal corporations, on account of the lien of the United States upon the same, for the costs of surveying, selecting and *conveying* the same, or because no patent has been issued therefor."

It was certainly the intention of Congress in passing that act to enable the Territories and States to tax these land grants. It certainly was the intention of Congress to shut every avenue of escape from taxation of these lands. It was within the power of Congress to permit the taxation of public lands if it saw fit, the same as it has been held to be within the power of State legislatures to permit the taxation of State lands.

State *v.* C. P. R. Co., 21 Nev., 247.

And it is the duty of courts to give full effect, according to its spirit and evident intent, to this Act of Congress passed in pursuance of the suggestion made by this Court in the case of N. P. *v.* Traill Co. (115 U. S., 600), which called attention to the manifest injustice of a state of things which permitted the railroad company to hold and enjoy for every purpose a large amount of lands, and at the same time escape the burdens of taxation, which alone made and constantly increased the value of their lands by the construction of roads and bridges, by the maintenance of schools and courts, by the enactment and enforcement of laws, and by the per-

formance of all those duties which taxation alone enables a State or municipality to perform.

The question has already been fully answered by this Court.

Maish *v.* Territory, Adv. Sheets L. Coop., Oct. Term, 1896, p. 207;
N. P. *v.* Patterson, 154 U. S., 130;
C. P. Ry. Co. *v.* Nevada, 162 U. S., 512;
N. P. *v.* Clark, 153 U. S., 252.

In the case last cited were similar allegations as to the mineral land question and as to the matter of prior claims and rights.

The case was certified to this Court by the same court which has certified the case at bar, and the same question, differently framed, was asked concerning the taxability of these lands. The allegations of the bill bearing upon the question now under consideration were substantially those of the case at bar, for it is alleged that—

> "The Secretary of the Interior and the President of the United States have refused to certify or patent said lands to your orator, or any part thereof, claiming and pretending that they are unable to ascertain or determine whether or not said lands are mineral in character. * * *
>
> "The United States and its officers have failed and refused to certify said lands so described in said schedules under said grant to your orator, or to certify any lands in the State of North Dakota to your orator, but have held and still hold the said lists suspended and unapproved for the reason that it is claimed that said lands may be mineral in character, and as such excepted from grant to your orator, or that said lands may not have been free from claims or rights at the date of said grant and of fixing the line of definite location opposite said lands; and the said question as

to whether the title to said lands passed to your orator under and by virtue of said acts and joint resolutions of Congress and the compliance therewith by your orator is now in controversy and pending before the Commissioner of the General Land Office and the Secretary of the Interior."

(Transcript in N. P. *v.* Clark (Case No. 15,429), pp. 3 and 4.)

Now, in the Clark case, this Court declined to answer the questions as to the taxability of these lands for the reason that—

"the pleader had not shown affirmatively that the company did not possess equitable title or ownership in the lands described and assessed." * * * "Nor do the averments negative the fact that the appellant was properly chargeable with taxes on the lands coming within the grant of July 2, 1864, and within the limits of the line of definite location of its road."

The foregoing is a deliberate, distinct and emphatic announcement by this Court that the allegations of the bill in the Clark case, above set out at length, fail to show that the lands are non-taxable.

The Supreme Court of North Dakota so understood it, for in the case of the Northern Pacific Railroad Company *v.* McGinnis, 61 Northwestern, 1032, they say that in the complaint in that case there is no allegation that the lands are mineral—

"Neither is there any averment that the land department claims that they may be mineral and is withholding patents on that account. This fact appeared in the complaint in the case of the Railroad Company *v.* Clark and yet, the Federal Supreme Court in that case, appears to have regarded the question now under discussion as so utterly untenable that it barely touches it in its opinion. *The question was necessarily decided, for had*

the contention of the plaintiff in that case been well-founded the court must have sustained its bill, and have enjoined the tax proceedings as they would have been utterly without foundation. This question is a Federal one and this authority is decisive on the point."

Now is the bill in the present case within the lines suggested by Justice Jackson in the Clark case? That is to say, does it show affirmatively that the company did not possess the equitable title or ownership in the lands described and assessed, and negative the fact that the company was properly chargeable with taxes on the lands coming within the grant of July 2, 1864?

Although the allegations of the Clark bill have been made more diffusive in the present bill, yet they are the same allegations in effect and amount only to saying that there is or was a controversy over the right of the company to the lands in question. In fact the present bill is much weaker as to the lands described in Schedule "B," for as to them it is admitted that the controversy is now ended and that the result of it shows that there were no facts to sustain the claim made adverse to the railroad company.

THIRD.

WAS IT THE PURPOSE OF CHAPTER 99, OF THE LAWS OF DAKOTA, FOR 1883, TO EXEMPT LANDS GRANTED TO AID IN THE CONSTRUCTION OF THE NORTHERN PACIFIC RAILROAD BY THE ACT OF JULY 2, 1864, WHICH ARE OUTSIDE OF ITS RIGHT OF WAY AND ARE NOT SHOWN TO BE USED IN ITS BUSINESS AS A COMMON CARRIER?

The law of Dakota referred to reads as follows:

"Section 1. In lieu of any and all other taxes upon any railroad except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory belonging to the corporation owning or operating such railroads or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this Territory a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this Territory, as hereinafter stated, that is to say:

"Every such railroad corporation or person operating a railroad in this Territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the said gross earnings; and the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessments whatsoever, upon the property aforesaid. The said payments shall be made one-half (½) on or before the fifteenth day of February and one-half (½) on or before the fifteenth day of August in each year, and for the purpose of ascertaining the gross

earnings aforesaid, an accurate account of such gross earnings shall be kept by said company.

* * * "And for the purpose of securing to the Territory the payment of the aforesaid per centums it is hereby declared that the Territory shall have a lien upon the railroad of said company and upon all property, estate and effects of said company, whatsoever, personal, real or mixed, &c.

"Section 5. The lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased or contracted to be sold or leased, &c.

"Section 6. The moneys received or collected by the territorial treasurer in pursuance of this act shall be disposed of by him as follows: One-third thereof shall be retained by him in the territorial treasury for the use of the Territory, and the remainder shall be apportioned among the several counties into or through which railroads respectively run, in proportion to the number of miles of main track situated in such counties respectively."

The territorial government held that such lands were not within the exemption granted by the law.

The interpretation placed on the act of 1883 by the executive department of that government will best appear by uoting from the Report of the Territorial Auditor for Term nding Nov. 30, 1888, page 210:

"A copy of the order to assessors of June 1, 1887, is given below, together with a brief statement of the action taken by this department relative thereto:

"You are hereby instructed to carefully assess for the purpose of taxation, all real estate, whether in acre property or in town lots or in blocks, belonging to railway companies in this Territory, excepting only from assessment such real estate as is in actual use for railway purposes. The legality of the gross earnings law is very questionable coming into direct conflict as it does

with section 1925 of the organic act. However this may be there is no question but what all property not actually used for railway purposes is subject to assessment the same as property of individuals."

The report continues:

"I believe that every company except the Northern Pacific now accept the above interpretation of the law and have paid the taxes so assessed in addition to the gross earnings tax, which is in lieu of a tax upon property used in the operation of the railroad."

The auditor says:

"A fair interpretation would seem to be that this law exempts only such land as is used or needed for railway purposes. This was undoubtedly the intention of the legislature of 1883, for at that time no other property was exempted by its provisions, as no railroad corporation within the Territory was authorized to own or hold real estate not used or needed for railroad purposes (the only exception to this was in the case of lands granted by the General Government). The lands of the Northern Pacific Railroad were at that time wholly exempt from taxation on account of a lien by the General Government for unpaid survey fees."

(N. P. R. Co. *v.* Rockne, 115 U. S., 600. This obstacle to taxation was removed by act of Congress, St. at L., Vol. 24, p. 143.)

The report adds (p. 213) that the Chicago and N. W. Railroad and all short lines in the Territory had paid taxes assessed against real estate not used for railroad purposes.

It is true that after the State of North Dakota was admitted to the Union two district judges of the State, sitting in the Supreme Court of the State to take the place of two Supreme Court judges who were disqualified, did announce

that the exemption granted by the law of 1883 extended to these granted lands. But the only member of the Supreme Court sitting in the case dissented (N. P. *v.* Barnes, 2 N. D., 310; S. C., 51 N. W., 386). The case was subsequently overruled, on another point it is true. (N. P. *v.* McGinnis, 4 N. D., 494; S. C., 61, N. W., 1032). And the same two district judges overruled themselves, without admitting the fact, in the case of Fargo & S. W. Ry. Co. *v.* Brewer (3 N. D., 34; S. C., 53 N. W., 177), where it is held that town lots not used for railroad purposes were not within the exemption.

And in the case of Grandin *v.* Le Bar (3 N. Dakota, 446), the Supreme Court of the State after showing that the decision in the case of N. P. Ry. Co. *v.* Barnes, on still another point, was erroneous, use the following language concerning the opinion in that case:

> "It is proper to add that two members of this court were not qualified to sit in Railroad Co. *v.* Barnes, and, under a constitutional provision, district judges were called in to sit with Chief Justice Corliss, who vigorously dissented from the opinion of the majority in that case; *and no judge of this court has* ever concurred in or approved the decision in that case."

Therefore there is no authoritative decision of Territorial or State courts that the law of 1883, if valid, exempts these lands, but the consensus of local interpretation is to the contrary.

A consideration of the statutes of Minnesota, from which the law of 1883 was adopted, will sustain our construction of that law.

The act of the Minnesota Legislature, approved May 22, 1857 (Session Laws 1857, page 3, special session), incorpo-

rated the M. & P. Ry. Co. Section 18 of that act provided:

> "The said company shall in each year pay into the treasury 3 per cent. of the gross earnings of the said railroad in lieu of all taxes and assessments whatever, and in consideration of such annual payments the said company shall be forever exempt from all assessments and taxes whatever * * * upon all the stock in the said M. & P. Ry. Co., whether belonging to said company or individuals, and upon all its franchises or estate, real, personal or mixed, held by said company, *and said land grant by said act of Congress hereby authorized to be conveyed to the said M. & P. R. R. Co. shall be exempt from all taxation* till sold and conveyed by said company."

It will be noticed that the Dakota law of 1883 omitted the important words which are italicized in the foregoing quotation. Omitting those words the Minnesota statute was substantially the same as the law of 1883 in question.

Turning now to the decisions of the Supreme Court of Minnesota, we find that the St. P. M. & M. Co. succeeded to the rights and immunities of the M. & P. Co., including the exemption from taxation granted by the act above quoted. In 1882 the former company purchased 35,000 acres of timber land, not used directly for railroad purposes, but only for getting ties.

In Todd County *v.* Ry Co., 38 Minn., 163 (S. C., 36 N. W., 109), the question of the taxability of these lands was raised. The Supreme Court of that State; held the lands taxable, and it follows from that case that if the charter of the road had not exempted the land grant in express terms it would not have been exempt under an act as comprehensive in its terms as the Dakota Statute.

In the case of State *v.* N. P. Co., 39 Minn., 25 (S. C., 38 N. W., 635), it was held that although the granted lands were specifically exempted, yet that timber grown on those lands became taxable as soon as severed from the soil.

In Ry. Co. *v.* City, 39 Minn., 112 (S. C., 38 N. W., 925), it was held that city lots purchased in view of probable development of business, but not presently used for railroad purposes, were not exempt.

See also—

County of Ramsey *v.* Ry. Co., 33 Minn., 537 (S. C., 24 N. W., 313).

Now, when Dakota adopted, as it did in 1883, the gross earnings law of Minnesota, but in doing so omitted the only words by virtue of which in Minnesota the granted lands had been held exempt, the only reasonable inference is that the legislature of Dakota did not intend to exempt such lands from taxation.

The language of Section 5 of the Act does not indicate an intention to exempt such lands.

The section reads as follows:

> "The lands of any railroad company shall become subject to taxation in the same manner as other similar property, as soon as the same are sold, leased, or contracted to be sold or leased." * * *

Under the rule of strict construction, as declared by this Court in cases hereinafter cited, it is clear that to say that after such a time lands shall be taxed, is not equivalent to saying that until such time they shall not be taxed. Unless the intention to exempt is found in other sections of the act it did not exist.

But, to arrive at the true force of section 5, the circum-

stances under which the act was passed must be considered and the source from which it was taken. At the time of its passage these lands were exempt and needed no exemption from the territorial legislature. They were exempt because the survey fees were unpaid.

Rockne *v.* N. P., 115 U. S., 600.

Section 5 was copied from the Minnesota law. In that State, as we have seen, certain railroad lands were exempted from taxation by the charters of the roads.

Parcher case, 14 Minn., 297.

Instead of operating as an exemption, section 5 and the same section in the Minnesota law were enacted for the opposite purpose of getting lands under taxation at the earliest possible moment. There was at least one railroad holding lands in Dakota which were exempt as long as they remained unsold (but became taxable as soon as sold), by virtue of a charter granted by the Territory of Minnesota before the Territory of Dakota was organized and while a part of the region afterward forming Dakota Territory was in the territory of Minnesota. And just before the act of 1883 was passed the Supreme Court of Dakota had held that the charter exemption granted by Minnesota could not be impaired by Dakota legislation (Winona & St. Peter R. R. Co. *v.* County of Deuel, 3 Dakota, Territorial, 1). So that there was the same reason for some such provision for reporting sales in Dakota as there was in Minnesota.

The differences in verbiage between the law of 1879 and the law of 1883 do not indicate a purpose to exempt the lands.

The law of 1879 (ch. 46, section 24) reads as follows:

> "Every railroad corporation organized under the provisions of this act, and every person or corporation

operating a railroad in this Territory, except railroads operated by horse power, shall on or before the tenth of February in each year make and return to the treasurer of this Territory, in such form and upon such blank as shall be furnished by him, a true statement of the gross earnings of their respective roads for the preceding calendar year; the number of miles operated by each such corporation or person and the gross earnings per mile during such year. Every such railroad corporation or person operating a railroad in this Territory shall pay to the said treasurer two per centum of the gross earnings of such railroad each year for the first five years after such railroad shall be or shall have been operated in whole or in part; and three per centum of the gross earnings of such railroad for each and every year after the expiration of said five years. One-half of such amount shall be paid at the time that the report to the treasurer of the Territory hereinbefore provided is made, and one-half on or before the tenth day of August in each year. * * * The percentage of gross earnings hereinbefore specified to be paid in pursuance of the provisions of this section shall be in lieu of all other taxation of the road bed, right of way, station or depot grounds, track, rolling stock, water stations, water tanks, turn tables, engine houses, machine shops, depots and necessary buildings, tools, machinery, material for repairs, gravel beds, furniture, telegraph instruments and lines, and fuel of such railroad corporation, used in or incident to the operation of such road. All property of railroads not above enumerated, subject to taxation, shall be treated in all respects, in regard to assessment and equalization, the same as similar property belonging to individuals, whether said lands are derived from the general government or from other sources." * * *

This law of 1879 was "An act to provide for the organization of railroad corporations, to regulate the operation thereof, and to provide for the taxation of their property."

Only two sections of the act, 24 and 25, refer to taxation. As a revenue law the act was meager and imperfect. For this reason it may be supposed the legislature passed the act of 1883, here in question. It is true that the description of property exempted is in the act of 1883 in more general terms, but it does not follow that any more property was exempted, for the act of 1879 was unnecessarily explicit. If it had declared that the gross earnings tax should be in lieu of all other taxes on the property of railroad companies, no other or different property would have been exempted than is described with much verbiage. The framers of the act of 1883 were doubtless familiar with the numerous decisions of courts construing exemption clauses in revenue laws, and drew the statute accordingly. The fact that no larger percentage of the gross earnings was required to be paid by the law of 1883 than by that of 1879 indicates that no greater exemption was intended under the later act.

It is true that appellant seeks to justify an opposite inference from a comparison of these statutes of 1879 and 1883; but while we may buttress our walls thus and build an argument, the appellant cannot. **An exemption cannot be based upon inferences nor drawn from comparisons.** It must be found so plainly written that it cannot be read out or construed away. An exemption from taxation must be so clearly stated that no argument will make the purpose of the legislator more manifest. That which needs argument to bring it within the exemption, must by that fact be judged non-exempt.

> "Legislation which, it is claimed, relieves any species of property from its due proportion of the general burdens of government should be so clear that there can be neither reasonable doubt nor controversy about its terms. The power to tax rests upon necessity and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment. If on any

fair construction of the legislation, there is a reasonable doubt whether the contract is made out, this doubt must be solved in favor of the State."

Justice Davis in Bailey *v.* Maguire, 22 Wall., 215.

"The existence of a well-founded doubt is equivalent to a denial of the claim."

Phoenix F. & M. Ins. Co. *v.* Tennessee, 161 U. S., 174;
C. B. & K. C. R. Co. *v.* Missouri, 120 U. S., 569;
Wilmington & W. R. Co. *v.* Alsbrook, 146 U. S., 279;
Tucker *v.* Ferguson, 22 Wall., 527;
Ford *v.* D. & P. L. Co., 164 U. S., 662.

The words "any other property" in the description of property exempted, must be held to include only property of the same general character as had been already specifically mentioned.

The only language in the act of 1883, which is claimed to expressly include these lands, is the phrase "any other property" in the first section, which reads as follows:

"In lieu of any and all other taxes upon any railroads * * * or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this territory belonging to the corporation owning or operating such railroads, or upon the capital stock or business transactions of such railroad company, there shall hereafter be paid," etc.

But the maxim, "*Clausula generalis de residuo non ea complectitur quae non ejusdem sint generis cum iis quae speciatim dicta fuerant*," is one of the most common and elementary of all rules for construing statutes. Language fully as broad has often and always been interpreted in accordance with our position.

In the recent case of Ford *v.* D. & T. L. Co. (164 U. S., 662), this Court applied the rule in a case very similar to the present; holding that an exemption of the "capital stock and all the property and effects of said company," did not include lands not directly used for the purposes for which the company was chartered, although acquired under express authority of the legislature granted subsequent to the grant of the charter.

In the case of State *v.* Comrs. (23 N. J. L., 510), it appeared that the charter of the railroad company provided that it should pay certain sums on persons and property transported, and "that no other tax or impost shall be levied upon the said company," and the question was whether certain houses and lots owned by the company and let by them to their workmen were taxable, the Court held them taxable.

33 N. J. L. 474

In the case of Cook *v.* State it appeared that by the charter of a railroad it was required to pay a percentage on its earnings, "and that no other tax or impost for the use of this State shall be levied or assessed on said company." It was authorized by its charter to hold at each terminus or station "lands not exceeding five acres and to build on them houses, warehouses and other buildings, &c., and to take the rents, profits and emoluments thereof." Under this charter the company purchased one acre of ground and rented a part of it out for a coal yard as it was authorized to do. The Court held this land taxable.

See, also, State *v.* Hancock, 23 N. J. L., 315.

In the case of State *v.* Flavell (24 N. J. L., 370) it appeared that by the charter of the company "all the lands, tenements, hereditaments, goods and chattels to the said society belonging shall be exempt from all taxes."

The question was whether or not certain mountain land, town lots and farm lands, which were not used in the prosecution of the corporate business, were taxable; and the court held that they were. In the case of State *v.* Fuller (40 N. J. L., 328), it appeared that the State law of railroad taxation provided that upon all land used or owned for the purposes of their road, *or otherwise*, the companies should pay a certain percentage, and the question was whether certain land owned by a railroad, but not used for the purposes of the road as a carrier, were taxable under the general law or under the law of railroad taxation, and the Court held the lands taxable in the same way as if not owned by a railroad company.

See, also, Bank *v.* State, 104 U. S., 493; Fargo & S. W. Ry. Co. *v.* Brewer, 3 N. D., 34, where the words "other property" in the act here in question were held not to include town lots.

The exemption being in consideration of payment of a percentage of earnings, it is reasonable to suppose that the exemption included only property used to produce the earnings.

Such was the view taken by the courts of Minnesota of the statute which was the original of the one here in question. (Only, in the Minnesota law, the granted lands were specifically enumerated among the things exempted.)

> "In view of what we think is the purpose of the law, that all property shall contribute to the common burden of taxation; in view of what seems to us to be the obvious relation between the income which is charged with a percentage and the exemption which is declared,—it is considered that the apparent purposes of the law are accomplished by an exemption of such property as may be fairly said to be held and used presently for railroad purposes. * * * In brief, the

property of the corporation which is used for its purposes is exempt from ordinary taxation, because indirectly, through the method prescribed in the law, such property does yield to the State its proper tribute, and when not so used it is not exempt.

Ramsey Co. *v.* C. M. & St. P. Ry. Co., 33 Minn., 537;
Todd Co. *v.* St. P. M. & M. Ry. Co., 38 Minn., 163.

This ruling is based on the theory that the law is not one of exemption from taxation, but for commuting taxes, and only that property is not taxed by the ordinary method which is taxed by contributing to swell the earnings of which the State takes a portion. This is quite in accord with recent utterances of this Court.

In Bank of Commerce *v.* State of Tennessee (161 U. S., 134), it was held that a provision that "the bank should pay the State an annual tax of one-half of one per cent. on each share of capital stock, which should be in lieu of all other taxes," did not exempt the accumulated surplus from taxation.

Mr. Justice Peckham said:

"The exemption is not, in our judgment, greater in its scope than the subject of the tax."

See also Shelby Co. *v.* Bank, 161 U. S., 149;
Gardner *v.* State, 21 N. J. L., 557;
State *v.* Bank, 18 Southern Rep., 753 (Louisiana).

In Tucker *v.* Ferguson (22 Wall., 575), this Court, speaking of a gross earnings tax, said:

"That section imposes a tax with reference to the railroad itself. It has no relation to the lands owned by the company not used nor necessary in operating the road."

The provision of the law relating to the distribution of the gross earnings tax shows that it was not the intention to exempt the lands.

If the payment of the percentage of earnings had been intended to be in lieu of the land tax then a part at least of the payment should have been divided among the counties according to the value of granted lands unsold within such counties. It is a well-known fact that many of the counties of North Dakota contained large tracts of land owned by the Northern Pacific Railroad Company, but did not contain a mile of the line of the road of that company. Richland county in which the lands here in question are situated in one instance. Under the provisions of the law of 1883 Richland county received no part of the gross earnings tax paid by the Northern Pacific Railroad Company. This is the difference between the law of 1883 and the law of 1889, which was before this Court in the case of N. P. *v.* Clark (153 U. S., 252), and which was considered in the case of N. P. *v.* Walker (47 Fed., 681). In those cases the defendants had to admit that the legislature intended the exemption of the lands because the law of 1889 provided that a part of the proceeds of the tax should be divided among the counties according to the acreage of unsold granted lands.

The law of 1889 in that particular reads as follows:

> "Section 6. The moneys received and collected by the territorial treasurer in pursuance of this act shall be disposed of by him as follows: In case the railroad company paying such tax owns no land granted in aid of the construction of its railroad, one-third of the same shall be retained by the territorial treasurer for the use of the territory, and the remainder shall be apportioned among the several counties into or through which the railroad or railroads of such company run, in propor-

tion to the number of miles of main track situated in such counties respectively. In case the railroad company paying such tax owns lands granted in aid of the construction of its railroad, then thirty per cent. of the tax paid by such company shall be retained in the territorial treasury for the use of the territory, and forty per cent. shall be apportioned among the several counties into or through which the railroad or railroads of such company run, in proportion to the number of miles of main track situated in such counties respectively, and thirty per cent. shall be apportioned among the several counties in which lands forming a part of its land grant is situated, in proportion to the number of acres of surveyed and unsold lands in said counties."

FOURTH.

IF SUCH WAS THE PURPOSE OF THE ACT, WAS THE ACT VOID IN WHOLE OR IN PART AS TRANSGRESSING THE LIMITATIONS PLACED UPON THE POWER OF THE TERRITORIAL LEGISTURE?

That part of the law necessary to be read in considering this question has been already set out in this brief at page 15.

This Court will answer the question affirmatively because the State court has so answered it.

The Supreme Court of North Dakota has decided that if the law exempted these lands it was in so far void because in conflict with Revised Statutes of the United States, section 1925, which reads as follows:

> * * * "The legislative assemblies of Colorado, Dakota and Wyoming shall not pass any law impairing the rights of private property, nor make any discrimination in taxing different kinds of property; but all property subject to taxation shall be taxed in proportion to its value."
>
> N. P. Ry. Co. *v.* McGinnis, 4 N. D., 494.

It is true that one of the judges concurred in the decision solely on the ground that the question was federal and had been decided by the Circuit Court of the United States in the case of N. P. Ry. Co. *v.* Walker, 47 Fed., 681. But the other two judges while basing their decision on the same case of N. P. *v.* Walker, do not suggest that the authority conflicts with their own convictions.

The Supreme Court of the State having thus held in favor of our contention that the law was in conflict with an act of Congress, the question could not be brought on writ of

error to this court, as it might have been had the decision sustained the law. It would seem to follow therefore that such ruling of the State supreme court to the effect that a local act is invalid, should be followed by the federal courts.

> "Otherwise we should have the strange spectacle of two different tribunals having co-ordinate jurisdiction in the same State, differing as to the validity and existence of a statute of that State without any power to arbitrate between them. In speaking, however, of their jurisdiction as being co-ordinate, it is only meant that one has no power to enforce its decisions upon the other. As a matter of propriety and right the decision of the State courts is binding upon those of the United States."

South Ottawa *v.* Perkins, 4 Otto, 260;
Norton *v.* Shelby Co., 118 U. S., 425;
Elmendorf *v.* Taylor, 10 Wheat., 159;
Bank *v.* Buckingham's Exrs., 5 How., 317;
Tyler *v.* Cass Co., 142 U. S., 288.

And the same rule applies to the construction by a State court of the law of the Territory from which the State was organized.

Stutsman Co. *v.* Wallace, 142 U. S., 293.

The ruling of the Supreme Court of North Dakota that the law was invalid in so far as exempting the lands, is in accord with the opinion of the Attorney-General of the Territory of Dakota, rendered March 8, 1886.

(Pamphlet 8vo., pp. 39, published at Bismarck, D. T., 1888.)

The Attorney-General declared the law of 1883 unconstitutional because it conflicted with section 1925 of the Revised Statutes, already quoted, and with the Fourteenth Amendment to the Constitution of the United States.

Likewise, the executive department of the territorial government regarded the law of 1883 invalid, if construed as exempting these lands.

> "The legality of the gross earnings law is very questionable, coming into direct conflict, as it does, with section 1925 of the organic act. However this may be, there is no question but what all property not actually used for railway purposes is subject to assessment, the same as the property of individuals."
>
> (Territorial Auditor's Instructions to Assessors, June 1, 1887, quoted on p. 210 of Biennial Report of Auditor for period ending November 30, 1888.)

The auditor adds in his report that every company except the Northern Pacific accepted this interpretation of the law.

We contend, therefore, that the fourth question certified by the Circuit Court of Appeals is not open to argument in this Court.

But if it is, we can present the arguments here which led to the decisions against its validity..

The law of 1883, construed as exempting these lands, is in conflict with section 1925 of the Revised Statutes of the United States.

Section 1925 has been quoted at page 31 of this brief.

In the case of N. P. *v.* Walker, 47 Fed., 681, Judge Caldwell has so clearly stated the reasons for our position here that we quote his opinion:

> "The organic act provides that the legislative assembly of the Territory 'shall not pass any law impairing the rights of private property, nor make any discrimination in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value.' Land is made one of the subjects of taxation under the revenue laws of the Territory. Con-

ceding that under the organic act the legislature may select the subjects of taxation, and conceding that it may classify property for purposes of taxation, and that the different classes of property may be valued or taxed by different methods; assuming but not deciding, that it was competent for the legislature to provide for taxing railroads by a tax on their gross earnings—and the question remains whether the act we are considering is not in excess of the lawful exercise of any of these powers under the organic act. At the threshold of the discussion of this question it is essential to determine the character, condition and use of the property claimed to be exempt from taxation under the act. The property of this railroad company is not limited to its railroad. It still owns many thousands of acres of its land grant. 'Railroad property' and 'the property of a railroad company' are not equivalent terms. The term 'railroad property' is commonly understood to mean the property which is essential to a railroad company to enable it to discharge its functions and duties as a common carrier by rail. It includes the right of way, road-bed, tracks, bridges, stations, rolling stock and such like property. On the other hand lands owned and held for sale or other disposition for profit and in no way connected with the use or operation of the railroad, are not railroad property in the sense mentioned but are property of the railroad company independently of its functions and duties as a common carrier. The railroad company as owner of the railroad owes many duties to the public with reference to that property and its use. It must keep its road in operation, carry all freight and passengers offering, and must perform this service without partiality or discrimination, and for a reasonable compensation. It owes other duties to the public as owner of the railroad, which need not be enumerated. But as owner of these lands it owes no legal duty to the public in respect of them, except to pay the taxes on them. It may hold, lease or sell them; it may sell them for the highest price it can obtain, or may de-

cline to sell, lease or improve them on any terms. Its relation to these lands in the respects mentioned is the same that a natural person sustains to the lands he owns. So far as relates to its lands it is a landed proprietor, on the same footing with any other proprietor of lands. The money earned from the sale or lease of these lands, as well as the unearned increments accruing by reason of their continued holding and the improvement of the surrounding lands, does not enter into the gross earnings of the railroad company upon which the tax is levied. The earnings upon which the tax is assessed are by the the terms of the act restricted to 'the gross earnings arising from the operating of such railroad.' It will thus be seen that while the plaintiff's railroad is taxed on its gross earnings, the lands belonging to the company are not taxed at all. They are neither taxed upon their value nor the income derived from them. The plaintiff is not in the position of a company whose charter exempts its property from taxation It accepted a grant of taxable lands. In the matter of taxation there is no difference between the lands owned by this company and lands owned by any other corporation or by a natural person. Lands by whomsoever owned, are subject to taxation, and must be taxed by a uniform rule according to their value. This is the rule of the organic act and it must be observed. But it is said the legislature, in the exercise of its powers to select the subjects of taxation and classify property for taxation, 'may place railroads in a class by themselves and tax them and their property different from other persons; the only limitation being that all railroads in the same class must be taxed alike.' But as before stated, conceding that under the organic act railroads may be classed by themselves for the purposes of taxation, and taxed by a method applicable to them alone, still that classification and method of taxation must be restricted to what is railroad property. It cannot be extended to lands which have no relation to the railroad, its uses or operation. The franchises of railroad companies and their earnings and railroad

property, may well be classed by themselves for purposes of taxation, and taxed by a different method or rule from that applied to other property. This may be done because it is unlike other property. It is the difference in the character, condition and use of this kind of property from other property that justifies the difference in classification and the mode of taxation. Property of the same kind in the same condition and used for the same purpose, must be taxed by a uniform rule without regard to its ownership. The legislature having selected land as a subject of taxation, all lands under the same conditions are subject to be taxed. The law for the taxation of lands must operate equally and uniformly upon all lands the condition and use of which are similar. While property may be classified for the purposes of taxation, between the subjects of taxation in the same class there must be equality. Property of the same kind and in the same condition, and used for the same purpose, cannot be divided into different classes for purposes of taxation, and taxed by a different rule, because it belongs to different owners. But this is precisely what the act under consideration seeks to do. It exempts the lands of the company from taxation simply and solely because they belong to the company, and taxes all other land by a uniform rule according to their value. It was not competent for the legislature either under the organic act or the fourteenth amendment of the Constitution of the United States, to classify the lands in the territory for purposes of taxation, into lands owned by railroad companies and lands owned by all other persons, and declare that the former should not and the latter should be taxed. The prohibition in the organic act against making 'any discrimination in taxing different kinds of property' necessarily implies a prohibition against any discrimination in taxing the same kind of property. It establishes the just and reasonable rule, which has become fundamental in our American system of taxation, that the burdens of taxation shall fall equally upon all owners of the same kind of property. If the act in

question is valid, then the wholesome and just provisions of the organic act, intended to secure equality in the burdens of taxation and to prevent discrimination and oppression, are meaningless."

We admit that railroad property may be taxed in a special method and at a special rate. But by "railroad property" is meant property necessary in the usual daily conduct of business as a common carrier by rail.

Cook *v.* State, 33 N. J. L., 474.

"Railroad property" would include road bed, depots, cars, engines, but not coal mines, nor timber lands purchased by the company for getting out fuel or ties.

Todd Co. *v.* Ry. Co., 38 Minn., 163;
Ramsey Co. *v.* Ry. Co., 33 Minn., 537.

Nor town lots, nor houses rented to employees.

State *v.* Comrs., 23 N. J. L., 510.

Nor any land except what the company could have condemned; it being authorized to condemn all land required in the performance of its duties to the public.

State *v.* Hancock, 33 N. J. L., 315.

Nor would machine shops for manufacturing engines and cars be included.

R. R. Co. *v.* Berks, 6 Barr., 70.

Nor land bought in at execution sale on a judgment for unpaid freight.

Bank *v.* State., 104 U. S., 493.

The legislature of Iowa passed an act providing that every railroad company should be liable for all damage sustained by any person, including employees of the company, in consequence of the neglect of any of its agents, engineers or other employees. In McAnnich *v.* Ry. Co. (20 Iowa, 343),

the defendant contended that the act was unconstitutional because it imposed a liability on railroads but not on other common carriers. The Supreme Court held the law valid on the ground that the railroads were a class of corporations distinguished from other employers of labor by the extra hazardous nature of the employment. Now, the language of the act was broad enough to include any person employed by a railroad company, whether in cutting ties, running an engine, or repairing cars. But in the later case of Deppe *v.* R. R. Co. (36 Iowa, 52), the Court considers the question how far railroad companies are a class with respect to relations with employees, and lays down the very rule for which we are here contending. Judge Cole in that case said:

> "If the statute should be so construed as to apply to all persons in the employ of railroad corporations, without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply on the same terms to all in the same situation, and hence would be unconstitutional—manifestly so. To illustrate—suppose a railroad company employs several persons to cut the timber on its right of way, where it is about to extend its road, and the land-owner employs a like number, seven persons, to cut the timber on a strip of equal length alongside of such right of way. If one of each set of employees shall be injured by the negligence of a fellow-employee and the employee of the railroad company can under the statute maintain an action against his employer and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation."

A railroad company may own ten thousand sheep, which it may exchange for cars, but that does not make the sheep "railroad property," and it would not change the principle if it were true that the company had no other means of get-

ting the cars. But land, *as such*, outside the right of way, can no more be used in the business of a carrier by rail than can sheep. Land may be exchanged or sold, like the sheep, and "railroad property" thereby obtained, but neither lands nor sheep are "railroad property."

The appellants will doubtless urge here as they have previously, that these lands are "railroad property" in the strict sense of the term, because they are used in the business of the railroad. But the form of the question seems to exclude such argument. The fourth question, inserting what is, by reference to the preceding question included, reads as follows: "If the purpose of the act was to exempt lands lying outside the right of way and not shown to be used in the business of the company as a common carrier, was the act void, etc." To say, then, that the lands are used for railroad purposes is an evasion of the question, not an answer.

But, is it true that the lands have been devoted to any "railroad use"? Is there any provision in the grant requiring the company to use a dollar of the money received from the lands in the building or running of its road? Suppose that the company had sold the lands for twice the cost of the road, would not the surplus have gone into the pockets of the stockholders? And suppose that the next day the company had refused to operate the road, what could Congress have done, more than forfeit the charter? Or suppose the whole line had been built and equipped without selling or mortgaging the lands, could not the company thereafter have sold them and divided the purchase money? The grant was a gift, a bonus. The land could not be sold in advance of construction and that was the sole limitation.

But if, as appellant claims, the lands were devoted to a special purpose, what was it? The charter of the company is entitled, "An Act Granting Lands to Aid in the Con-

struction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound on the Pacific Coast by the Northern Route." Appellant contends that the lands being granted to aid in constructing a railroad and telegraph line became "railroad property." We could contend with equal reason that they became telegraph property; or, does the telegraph line become a railroad line when owned by a railroad company? When this grant was made the tide of war was at its flood. The unity of the country was imperiled from without and from within. The pioneers of the Pacific slope had founded in a region of marvelous wealth a civilization separated by desert, wilderness and mountains from the communities of the East. Rapid communication, electric intercourse, was needed to keep these distant members in touch. For the accomplishment of the ends which Congress had in view the telegraph was as important as the railroad and the lands are as truly telegraph as railroad lands.

But whether we call them railroad lands or telegraph lands, the naming of them does not segregate them from all other lands for purposes of taxation. Persons and things may be classified in many ways, as we take one criterion or another; according to their attitude toward certain theological dogmas; according to their ability or inability to read and write; according to the trades they follow. These lines of classification intersect at all angles. The State may classify men for various purposes; may say who shall serve as jurors, who be subject to military duty, who may vote, and who hold office. But every such classification must be upon a basis for which sound reasons can be given. Men cannot be classed for duty as soldiers according to their religious beliefs or political preferences. But men of less than a certain stature may be excused, as well as cripples, invalids, the aged or those engaged in certain avocations deemed of special importance to the State. Men may be classified for

jury duty, but not on any such absurd basis as length of beard, color of hair, political preferences. So classification of men and things for taxation must be based on differences in their relation to the State, when considered as subjects for enforced contribution to public funds. But these lands are not distinguished in any way from other lands save by ownership.

There is no difference between them and other lands in the use made of them.

In every State, and especially in the West, large areas are held for speculation, idle and unimproved. The northwest quarter of section—town—range—mentioned in the schedules is covered with grass just like the adjoining quarters owned by some grantee of the company; their owners taking no thought except to avoid the payment of taxes, while they securely wait till the labors and sacrifices of surrounding settlers, till the taxes paid by others to build roads, bridges, school and court houses, till civilization wrought out by others shall have greatly enhanced the value of their acres; then they will realize the unearned increment by selling at a high price to the very men who have made the lands valuable. In its use of the lands the appellant is no more restricted than is any other corporation organized to buy and sell real estate, no more than a bank taking lands on a mortgage. The railroad company has a perfect right to sell or not to sell, to mortgage or to sell to whom and at what price it will or can. The resolution of 1870 merely annexed a condition subsequent that limits the power of alienation but in no manner affects the nature of the estate conveyed. Because a man may hold an estate with a possible condition subsequent limiting the price at which he may sell, is the legislature thereby warranted in putting him in a class by himself for purposes of taxation? That fact makes no difference in the amount of tax which the land ought to pay.

But such considerations have at best no bearing in this case. The appellants continually assume that the act of the Territorial Legislature was enacted especially for the benefit of the Northern Pacific Railroad Company, and is in effect a special act relating to the company, so far as it refers to land grants. But the law is in its terms general and applies to all roads and to all land-grant roads whether then existing or thereafter to be incorporated; and if appellants' grant is circumscribed, or apparently so, by any peculiar conditions not common to every land grant, those peculiar conditions can avail nothing here as a basis of classification. Appellant must maintain that all lands granted to railroads are by that fact set apart from all other lands for purposes of taxation, or at least that that bare fact may be used by the legislature of a power which did not grant the charter of the roads as a basis of exemption from taxation.

> "Classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that a man beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis."
>
> Gulf C. & S. F. R. Co. *v.* Ellis, 165 U. S., 150.

It is claimed, however, that there are expressions in the opinion of this Court, written by Mr. Justice Jackson, in the case of N. P. *v.* Clark (153 U. S., 252), which sustain the Dakota gross earnings law of 1889, and therefore also the

law of 1883. In that case the question of the validity of the law of 1889 was asked but not answered. The Court answered another question, and said:

> "In the view we take of the case the answer to the last question will dispose of the suit and render it unnecessary to enter upon the consideration and determination of the other propositions of law on which instructions are asked."

In the light of this statement the remark later on in the opinion that—

> "Payment of the gross earnings tax imposed by the act of 1889 would have discharged all claims for taxes upon the company's lands for that year"—

must be taken as if there were added thereto, "provided the law was valid as contended by the railroad company." The Court, in the same case, say of the law of 1883:

> "It is not material to the present case to consider whether this act was constitutional or not."

The appellants will doubtless cite cases in which exemption of such lands made in the charter granting the lands has been held valid. But such cases, as Judge Caldwell states in the opinion above quoted, are not analogous to this one. Lands held by the sovereign are not taxable, and when he grants them he may probably, in consideration of the benefits to be gained by him from the grantee, continue the exemption from taxation for a definite or indefinite period. But this case is wholly different. The Territory of Dakota neither chartered the company nor granted these lands, the company was under no duty to the Territory on account of its land grant, its obligations on that behalf were to the United States. To the Territory it owed no other duties than the law imposes on any common carrier by rail.

The act of 1883 is void, in so far as it exempts the lands in question, because in conflict with the Fourteenth Amendment of the Constitution of the United States.

All that has been said of the bearing of section 1925 of the Revised Statutes on this question is applicable with reference to the Fourteenth Amendment.

Giozza *v.* Tiernan, 148 U. S., 657;
Home Ins. Co. *v.* N. Y., 134 U. S., 594.

The law of 1883, if so construed, is in conflict with the Fifth Amendment of the Constitution of the United States.

The Fourteenth Amendment applies in terms only to the States, not to Territories; the Fifth Amendment, however, as it applies to Congress, applies also to the legislatures of the Territories, to which Congress could not delegate powers which it did not itself possess.

The argument under this head would be the same as that already given.

The law of 1883, construed as exempting these lands in consideration of the payment of a percentage of gross earnings, is void as conflicting with the principle that taxation must be for purposes public and local to the taxing district.

The principle is too well established to admit of discussion. (Cooley on Taxation, page 104.)

Section six of the law of 1883 provides as follows:

> "The moneys received or collected by the territorial treasurer in pursuance of this act shall be disposed of by him as follows: One-third thereof shall be retained by him in the territorial treasury for the use of the Ter-

> ritory, and the remainder shall be apportioned among the several counties into or through which railroads respectively run, in proportion to the number of miles of main track situated in such counties respectively."

That is to say, Richland county and several other counties received not one cent of the moneys paid in by the Northern Pacific Railroad Company in consideration for the exemption of the lands in Richland county, because it happened that no part of the line of the Northern Pacific Railroad extended into those counties; but the counties through which the road was built received money whether any part of the lands therein situated, granted to the railroad company, remained unsold or not. In other words Richland county was taxed for the benefit of other counties and not for its own benefit. These lands in Richland county were taxed by a commutation, but not in any degree for the benefit of the taxing district in which they lay.

The law of 1883 is void because it imposes a charge on interstate commerce.

One of the "limitations placed upon the powers of the territorial legislature" is that it shall not attempt to regulate commerce between the States.

This power and duty committed to Congress cannot be delegated to the legislature of a Territory.

Stoutenburgh *v.* Hennick, 129 U. S., 141.

The law of 1883 required the railroads to pay a percentage of "all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated in this Territory." The law of Minnesota, which was the source of the law of Dakota, provided (ch 105, Laws of 1877, sec. 1):

> "Each railroad corporation owning or operating a railroad in this State shall on or before the first day of

> February in each year make to the State railroad commissioner a true and just return of the gross earnings of its road within this State for and during the year ending the last day of December next preceding."

Under this law of Minnesota nearly all the railroads of that State, including the Northern Pacific Railroad, have ever since 1877 (and many of them for a longer period) been paying a percentage on earnings, both local and interstate. In the year 1884 the railroads paid into the treasury of Minnesota about six hundred and sixty thousand dollars. The earnings on which percentage is to be paid are calculated according to the ratio between the number of miles which each consignment of freight and every passenger is carried in Minnesota and the whole number of miles which the freight or passenger is carried. In this way the earnings of the divisions of the road lying in Minnesota are estimated, derived from local and from interstate traffic, and on all of them a percentage is paid.

Under the law of 1883 every road in the Territory of Dakota adopted, without question, the same rule of measurement prevailing in Minnesota, reported the earnings every year, including the proper proportion of all earnings on shipments which began in, passed through, or ended in the Territory of Dakota. The same rule had been followed under the law of 1879, which has been already quoted in this brief (p. 21).

> "Previous to 1887 * * * the entire business of the road was considered when making up the statement of earnings for taxation under the gross earnings law of the territory."
>
> (Territorial Auditor's Report, Nov. 30, 1888, page 212.)

But in 1886 this Court, in the case of Fargo *v.* Michigan (121 U. S., 230) held, that States could not collect a tax on

earnings derived from interstate commerce. Thereupon the Northern Pacific Company sought to take advantage of that decision to escape from the larger part of the gross earnings tax and refused to pay a percentage on anything more than the earnings on business which both began and ended in Dakota Territory. Some personal property of the company was distrained for the unpaid part of the tax and thereupon the company brought suit.

N. P. Ry. Co. *v.* Raymond, 5 Dakota, 356.

It appears from the complaint in that case (abstract, page 7 and report of case), that the gross earnings of the company in 1886 were $2,654,756.31, of which $2,309,549.25 was earned by the main line and the rest by branch lines in Dakota. This sum of $2,654,756.31, is the proportion for Dakota of the entire gross earnings of the line in 1886, which amounted to more than twelve millions (R. R. Commissioner's Report, Dakota, 1888, page 87). Of course, no part of earnings which did not arise in, end in or pass through the Territory were included in the amount as reported above, and only a proportionate part of earnings arising from traffic which was not wholly within the Territory. But less than $400,000.00, or scarcely more than one-seventh of the entire Dakota earnings was earned on traffic which both began and ended in Dakota—that is, traffic lawfully taxable by the legislature of that Territory. On the fifth day of March, 1887, the railroad company paid the installment of its gross earnings then due, based on said sum of more than two and a half millions, as previously reported—namely, a tax of $38,095.61, thus admitting that the tax was on interstate as well as local earnings, for on local earnings it would have had to pay about six thousand dollars only. In its complaint in the case last cited the company did not aver that the law did not mean to impose a tax on interstate commerce, but did allege that its earnings on interstate com-

merce could not be taxed. The judgment of the trial court in the case last cited was, "that in so far as said act of the Territorial legislature assumes or pretends to impose a burden or tax on interstate commerce * * * the same is unconstitutional, null and void." (Abstract, page 15.) In the supreme court of the Territory, on appeal from this judgment (N. P. *v.* Raymond, 5 Dakota, page 356), that court said:

> "It is clear at the outset and conceded by the Attorney-General for the appellant that so much of the act approved March 9, 1883 * * * as provides for a tax or a payment of a per centum in lieu thereof upon the gross earnings of a railroad company operating in this Territory, received from business—the transportation of persons or property—not local, that is not originating and ending wholly within this Territory, but interstate, and therefore coming under the head of interstate commerce, is unconstitutional and void."

The opinion of the Attorney-General of the Territory on the same question is found on page 5 of his brief in the case just referred to:

> "The amount paid by plaintiff March 5th, 1887, was paid in satisfaction of the installment which became due February 15, 1887, and was the exact amount of such installment, as appeared by the voluntary statement made by the plaintiff. Up to and including that date, it had been the uniform practice and custom of plaintiff to pay a percentage upon all the gross earnings of the corporation within the Territory, whether local or otherwise; and such is the plain spirit and intent of the law."

Thus the entire judicial department of the territorial government construed the law as levying a tax on interstate commerce, as well as on local traffic; and we have seen from the auditor's report that the executive department con-

strued it the same way; and so had the railway companies themselves, all of them:

> "Prior to 1887 the various railway companies operating lines of railroad in this Territory, paid under the present law of taxing their gross earnings, not only on local business, but also on the through business in proportion to the number of miles in the Territory."
>
> (Biennial Report Territorial Treasurer, November 30, 1888, page 98.)

The Legislature of Dakota, at the first session after it was found that no percentage on interstate earnings could be exacted, repealed the gross earnings law of 1883. Chapter 105 of the laws of 1889 is the repealing statute. And a few weeks later enacted the gross earnings law of 1889 (ch. 107, laws of 1889), which contained the following provision:

> "Any railroad company may accept and become subject to the provisions of this act * * * provided that any railroad company which is in arrears in the payment of taxes assessed under chapter 99 of the laws of 1883 (the law here in question) shall within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assessments under said law of 1883, before they can avail themselves of the provisions of this act by accepting its terms, *including taxes on both territorial and interstate earnings.* * * * Any company which has not complied with the provisions of chapter 99 of the session laws of 1883 by paying all taxes claimed on gross earnings, both territorial and interstate, or by filing an account of gross earnings, both territorial and interstate, shall prepare and file such account in the manner therein provided and * * * pay * * * the entire amount of taxes heretofore claimed by the Territory on local and interstate earnings of such companies, but remaining unpaid * * * and shall pay at the time of rendering such account all amounts claimed by the territorial auditor as tax due on the

local and interstate earnings of the company for the current or any preceding year."

It is true that a statute capable of two constructions, one making it void and the other leaving it valid, will always be so construed as to be a valid law; but that rule has no application to the law of 1883, because, first, the law is susceptible of but one interpretation; and, second, at the time when the law was passed it was generally supposed that a State could tax earnings derived from interstate commerce; this belief was founded on a decision of this Court: State Tax on Gross Receipts, 15 Wall., 284.

Del. and H. Canal Co., 17 Atl., 175;
Fargo *v.* Auditor-General 24 N. W., 538;
Telegraph Co. *v.* Mayer, 28 Ohio St., 521;
Express Co. *v.* St. Joseph, 66 Mo., 675;
Dissenting Opinion of Judge Corliss in N. P. *v.* Barnes, 2 North Dakota, 310, where a full discussion of this question will be found.

There is, therefore, no reason for the Court to assume that the legislature did not intend to tax interstate earnings, for at the time of the passage of the law of 1883 it was generally conceded that the States could tax them.

It is true that after the law of 1883 had been repealed, the law of 1889 repealed and the State of North Dakota admitted to the Union, two district court judges sitting in the places of two members of the supreme court of that State passed on the territorial law of 1883, and held that it was not intended thereby to require the railroad companies to pay a percentage on interstate earnings.

N. P. *v.* Barnes, 2 N. D., 310.

But that decision was overruled (on another point it is true) in the case of N. P. *v.* McGinnis (4 N. D., 494), and the entire law of 1883 was declared invalid. Certainly this

Court cannot be controlled by the speculations of two *nisi prius* judges concerning the meaning of a law of that State after the supreme court of the same State have held the law itself void. And in discussing the third question the writer has shown that this decision of the two lower court judges was overruled on still another point and the three judges who have composed the Supreme Court of North Dakota ever since the admission of the State took occasion to announce that no one of them approved that decision.

This Court in N. P. *v.* Clark (153 U. S., 252), assumed without question that the act of 1883 required payment of a percentage of the interstate earnings. Justice Jackson in the opinion in that case said:

> "It is not material to the present case to consider whether this act was constitutional or not; it was repealed by the act of legislature approved January 29th, 1889. Now it is shown by the bill that at the time the act of 1883 was repealed the appellant was in default of the payment of the percentages due upon its gross earnings for the years 1886, 1887 and 1888."

But the only part of the tax as to which appellant was in default was the percentage on interstate earnings, the local earnings having been accounted for and the payments on them made at the dates specified in the law of 1883.

Since then, the act of 1883 imposed a tax on interstate as well as local earnings, and was invalid so far as the tax on interstate earnings is concerned, it follows that the whole law was void; and this from the application of either one of two propositions:

Proposition A.

"If the parts of a statute are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other as to warrant the belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not

have passed the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them."

Cooley on Con. Lim., pp. 216, 217, 4th Ed.;
Allen *v.* City, 103 U. S., 80;
Virginia Coupon Cases, 114 U. S., 270;
Warren *v.* Mayor, 2 Gray, 99.

The law of 1883 was a plan for taxing railroads; those parts of it providing for payment of a percentage on business were a compensation for the exemption granted. For it must be supposed that the legistature intended the railroad companies to pay their fair share of taxes; and the plan of taking part of the earnings was a substituted method of taxation. It is difficult to imagine a case where the parts of a statute could be more interdependent and mutually compensatory. As the law appeared to the minds of the legislature it was fair to the roads and fair to the territory; but when by the decision of the territorial supreme court in N. P. *v.* Raymond (5 Dakota 356), obtained at the suit of the railroad company itself, six-sevenths of the consideration for the exemption was lost to the territory, the law which the legislature had thought fair and just became most unfair and unjust, and the legislature did not let it remain on the statute books a day longer than the time necessary to repeal it. Certainly it cannot be supposed that the legislature which granted an exemption in consideration of the payment or one hundred thousand dollars yearly would have given the same exemption on payment of one-seventh of that sum.

Proposition B.

"A statute which is in part invalid must be held to be wholly invalid, unless the parts—that which is constitutional and that which is unconstitutional—are capable of separation, so that each may be read by itself."

Baldwin *v.* Franks, 120 U. S., 678;
U. S. *v.* Reese, 92 *id.*, 214;
Keokuk *v.* Keokuk, 95 *id.*, 80;

Trade Mark Cases, 100 *id.*, 82;
Virginia Coupon Cases, 114 *id.*, 270;
U. S. *v.* Harris, 106 *id.*, 629.

The statement is as nearly as possible in the language used by Chief Justice Waite in the case first above cited, in which will be found an elaborate review of the other cases cited above.

Now, nothing can be clearer than that, in the case at bar, it is impossible to cut out and separate the invalid part. In order to make the act valid it would be necessary not to strike out but to add words, so as to limit the payments required to a percentage of local earnings; for the same words describe those earnings which are taxable and those which are not. As this Court said in Baldwin *v.* Franks, *supra*: "The limitation which is sought must be made by construction, if at all; not by separation. This, it has often been decided, is not enough."

Therefore, this law was wholly void in 1888, when the taxes involved here were levied and became due and payable. Under the law of Dakota Territory lands were assessed for taxes as of the first of April; the taxes were levied in August and became payable in November. The lands, then, were not exempted when the taxes were assessed, levied and due. The valid taxes so levied and due were never abated or vacated by any act of the legislature, or of any other body. And as if to close all questions about it the legislature, as we have seen, in January, 1889, repealed whatever might be supposed to remain of the law of 1883. There was, it is true, another gross earnings law passed after the levy of these taxes—after they had become due and after the law of 1883 had been repealed. This second law was passed in March, 1889, and is chapter 107 of the laws of that year, but it contains not a syllable about the land taxes already levied and due for the year 1888; it relates no more

to the taxes on lands for the year 1888 than for the year 1878. Those parts of the law of 1889 having any bearing on this point read as follows (Laws of 1889, Ch. 107, Sec. 1):

"In lieu of any and all other taxes upon any railroads, except railroads operated by horse-power within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory belonging to the corporation owning or operating such railroads, upon the capital stock or business transactions of such railroad company, there shall hereafter be paid into the treasury of this Territory an amount equal to a percentage of the gross earnings of the corporation owning or operating such railroad arising from the operation of such railroad as shall be situated within this Territory, both upon territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided. Every such railroad corporation or person owning or operating or that may hereafter own or operate any line of railroad in this Territory, which shall have accepted this act shall pay to said treasurer each year for the first five years after the approval of this act an amount equal to three per centum of such gross earnings and for and in each and every year after the expiration of such five years an amount equal to two per centum of said gross earnings, and the payment of such amount annually as aforesaid shall be and is in full of any and all taxation and assessment whatever upon the property aforesaid. Said payments shall be made except as hereinafter provided, one-half on or before the fifteenth day of February and one-half on or before the fifteenth day of August in each year," etc.

Section 2 provided a penalty for failure to make returns of earnings.

Section 3 provided penalty for failure to pay the percentages.

Section 4 provided for distraint on failure to pay percentages.

Section 5 provided that lands of the companies should

become subject to taxation as soon as sold, leased, contracted to be sold or leased.

Section 6 provided for apportionment of taxes among the counties, and has already been set out at page of this brief.

Section 7: "Any railroad company which, at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this Territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors attested by its secretary and filed with the secretary of the Territory, accept and become subject to the provisions of this act, and provided that any railroad company which is now in arrears in the payment of taxes assessed under Chapter 99 of the Laws of 1883, shall within thirty days after the passage of this act, pay into the Territorial treasury the full amount of the taxes and interest due under the assessments under said law of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both Territorial and interstate earnings. It is further expressly provided that any company failing strictly to comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and taxation in the manner provided for the assessment and taxation of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the session laws of 1883 by paying all taxes claimed on gross earnings both Territorial and interstate, or by filing an account of gross earnings both Territorial and interstate, shall prepare and file such account in the manner therein provided within thirty days after the passage of this act, and pay one-half the entire amount due under the acceptance and agreement herein referred to for the current year, and also the entire amount of taxes heretofore claimed by the Territory on local and interstate earnings of such companies but remaining unpaid at the time of filing such account and within thirty days after the passage of this act, or the same shall not apply to such com-

pany or companies. The balance of said taxes due for the current year, shall be paid to the Territorial treasurer on or before the fifteenth day of August, 1889," etc.

Section 8 provided as to taxing roads not accepting the act.

Section 9 provided that the act should be subject to repeal or amendment.

Section 10 provided that the law should take effect at once.

If then the law of 1883 was void for interference with interstate commerce, these taxes were lawfully levied on the lands in 1888. For even if the company could have waived the constitutional provision by paying the percentages according to the invalid law, it had not done so, but had sought the shelter of that very constitutional provision.

Nor can the appellants claim that the unconstitutionality of the law of 1883 was waived by the Northern Pacific Railroad Company in making the payments as stated in the bill in this case, for it appears that those payments were made long after the taxes here involved were levied and due, long after the company itself had obtained from the courts of the Territory, a decision that, as to six-sevenths of the taxes imposed by the law of 1883 that law was void and after the law of 1883 had been repealed. And it plainly appears that those payments were made solely to obtain the benefits offered by the law of 1889, which was an offer or contract on the part of the Territory, not strictly a law; the companies were not compelled to accept it and can claim nothing by reason of acceptance save what is plainly granted by the act; and the act neither expressly nor impliedly abated the taxes theretofore in any year levied on the lands.

FIFTH.

CONCEDING THAT THE PURPOSE OF CHAPTER 99 OF THE LAWS OF 1883 WAS TO EXEMPT, AMONG OTHER THINGS, THE LAND GRANT OF THE NORTHERN PACIFIC RAILROAD COMPANY, AND THAT SAID LAW IS VALID, ARE THE PAYMENTS OF THE PERCENTAGE OF THE GROSS EARNINGS FOR THE YEAR 1888 ALLEGED IN THE BILL TO HA[illegible] BEEN MADE SUFFICIENT TO ENTITLE THE COMPLAINANT TO THE EQUITABLE RELIEF SOUGHT?

The writer concedes that the railroad company had promptly paid all percentages on *local or intrastate earnings* as the same became due under the law, up to the time when it was repealed, in January, 1889. And if the legislature meant to exempt these lands and had power to do so, and if by the law no tax or charge on interstate commerce was intended, then he concedes that the payments were sufficient.

But if it be determined, as we contend, that the law did require payment of a percentage of earnings from interstate traffic, and if it can possibly be held that such a law is valid, then we contend that the payments made were not sufficient for the purpose mentioned. And this for the reasons stated in the last part of the discussion of the Fourth question: The payments on interstate earnings were not made in pursuance of the law of 1883, nor in order to obtain the benefit of that law, but were made after that law had been repealed without a saving clause, so that the companies were released from every liability under that law, and were made solely to obtain the benefit of the new law of 1889. The company and its receivers ought not to be heard claiming any exemption under the law of 1883 by virtue of payments so made.

SIXTH.

CONCEDING THE LANDS IN CONTROVERSY TO HAVE BEEN SUBJECT TO TAXATION FOR THE YEAR 1888, WERE THE APPELLANTS BY REASON OF ANY OF THE ALLEGED IRREGULARITIES OR DEFECTS IN THE MODE OF ASSESSMENT, ENTITLED TO EQUITABLE RELIEF WITHOUT FIRST OFFERING TO PAY THE TAXES PROPERLY CHARGEABLE AGAINST SAID LANDS?

The inquiry is limited to the method of valuation.

The bill alleges numerous defects at all stages of the tax proceedings, but only those need be considered which affect the valuation of the property. By the very terms, also of the question, it is conceded that the property was assessed. Now there are allegations in the bill to the effect that there was no assessment whatever of the lands. (Transcript, folio 24.)

> "(2) The said township and county assessors did not list and assess in the year 1888 the lands described in said schedules 'A' and 'B' or any of said lands, and omitted from the township and county assessment-rolls for said year the descriptions of said lands, and the descriptions of said lands do not appear in said roll."

These allegations were denied (Transcript, folio 36), and the issue of fact was submitted to the Circuit Court on a stipulation setting out as exhibits copies of the assessment-rolls referred to. (Transcript, folio 37.) From the wording of the question and from the fact that the issue of assessment or no assessment was determined not on the allegations of the bill, but on evidence not before this Court, I am strengthened in the conclusion that the question is limited strictly to those allegations of the bill which relate to the mode of assessment. So, too, the following allegation, which, perhaps, amounted to a statement that no assessment was

made in the county in the year 1888 was denied, and the issue of fact was likewise submitted on stipulation of record evidence:

> "(1) That the several county and township assessors for said county of Richland did not during the year 1888 make out, and did not make out and deliver to the county clerk of said county of Richland any assessment roll or rolls prepared in substantially the form prescribed by section 1582 of the compiled Laws of Dakota for 1887."
>
> (Transcript, folio 24.)

For answer see Transcript, folio 36. For stipulation see Transcript, folio 37.

Likewise the following allegation was denied, and the issue of fact so made was submitted on stipulated evidence:

> "(6) The Board of County Commissioners of said County of Richland did not hold a session of two days, commencing on the first Monday of July, 1888, as a board of equalization for the purpose of equalizing and correcting the assessment roll for said County of Richland."
>
> (Transcript, folio 25.)

For answer see Transcript, folio 36, and for stipulation Transcript, folio 37, the second paragraph of the stipulation.

It is true that the State Court, in Powers *v.* Larrabee, 2 N.D. 141, held that if the board of equalization met neither on the first Monday of July nor on the day following, the tax proceedings were void; but the bill does not allege that the board met on neither of those days, it alleges only that the board did not meet on the first of the days.

The omission of certain property from taxation did not invalidate the assessment of other property.

The appellants claim that the failure to assess certain other taxable property renders void the taxes on these lands. (Transcript, folios 20, 21 and 20.)

This omitted property consists of railroad rights of way, with rolling stock and equipment generally. A large portion of the property so omitted was property owned by the Northern Pacific Company.

But it is settled in North Dakota that the omission of some property from taxation will not relieve other property of taxes levied on it.

Shattuck *v.* Smith, 69 N. W. Rep., 5.

And this Court will follow the local decisions in such matters.

Witherspoon *v.* Duncan, 4 Wall., 210;
Barden *v.* Improvement Co., 157 U. S., 327;
Lewis *v.* Monson, 151 U. S., 545.

The defects in the mode of assessment do not entitle appellants to equitable relief without an offer to pay.

There remain to be considered the following allegations, which were demurred to (Transcript, folio 31, at the end of the folio) for want of equity.

> "(3) The said township and county assessors did not make out and deliver to the county clerk of said county on or before the first Monday of July, 1888, or at all any assessment-roll containing a list of all the taxable lands in said county in numerical order, beginning with the lowest section in the lowest numbered township, in the lowest numbered range in said county, and ending in the highest numbered section, township and range; that immediately following the description of lands in township 131 north, of range 47 west, on said assessment-roll, is the description of certain lands in township 131 and 132 north of range 52 west; that

the description of the lands described in schedules 'A' and 'B' situated in ranges 48, 49, 50 and 51 is placed in said assessment-roll after the description of a portion of the lands contained in range 52 west.

"(4) That said lands described in said schedules 'A' and 'B' were not assessed to said Northern Pacific Railroad Company for said year 1888, although said township and county assessors well knew that except for the claims of the United States thereto said Northern Pacific Railroad Company was the sole claimant thereof.

"(5) That the assessment roll of said county of Richland for the year 1888 does not show the number of the school and road district in which said lands described in schedules 'A' and 'B,' or any of them, were situated."

(Transcript, folio 25.)

It will be seen that the appellants do not claim that the assessment was excessive or fraudulent. This Court has never permitted taxes to be evaded for mere errors of form.

State R. R. Tax Cases, 2 Otto, 575;
Bank *v.* Perea, 147 U. S., 87.

The appellants do not allege that they were in any way injured by the insertion at the wrong place in the roll of some part of the lands in range 52, and to grant relief without such allegations is wholly inconsistent with the decisions of this Court and with the rulings of other courts of equity when applied to for relief from taxes.

Mr. Black, in his work on Tax Titles, section 90, quotes approvingly from the Supreme Court of Massachusetts to the effect that many regulations are made by statute designed for the information of assessors and officers, intended to promote method, system and uniformity in the modes of proceeding, the compliance or non-compliance with which, in no respect affects the rights of tax-payers. This may be considered directory. Officers may be liable, perhaps, to

punishment for not observing them, but their observation is not a condition precedent to the validity of the tax. The statute directing that the lands shall be assessed in a certain order is of this nature, and that a variance from that order does not render void the tax. This may be inferred from the fact that the law provides that the township supervisors, sitting as a board of review, may add lands omitted by the assessors to the list.

> "The board of supervisors of each town * * * shall m * * * for the purpose of reviewing the assessm * * * and in case any property, real or perso al shall have been omitted by inadvertence or otherwise, it shall be the duty of said board to place the same upon the list with the true value thereof." * * *
>
> (Section 797, Compiled Laws of Dakota, 1887.)

And after the tax list is made up and in the hands of the county treasurer, any lands omitted by the assessor may even then be added to the list. (Compiled Laws, section 1608.)

> "When the treasurer after the tax list is committed to him shall ascertain that any land or other property is omitted he shall report the fact to the county clerk, who upon being satisfied thereof shall enter the same upon his assessment roll and assess the value, and the treasurer shall enter it upon the tax list and collect the tax as in other cases."
>
> (Compiled Laws of Dakota of 1887, section 1608.)

Now it is quite evident that these additions cannot ordinarily be made at the place in the assessment rolls where the assessor ought to have put them; they would almost necessarily be made at the end of the book, regardless of the situation of the lands in the county.

The bill is not sufficiently specific in its statement of facts

in subdivision 3 of paragraph 11 to require an answer. The bill does not say whether the assessment roll complained of was made by the county assessor or by one of the township assessors, or by more than one of the township assessors. Where a county was organized under the township system the assessment rolls were all made by the township assessors, and there was no such thing as a county assessment roll. It does not appear from the complaint that in any one of the assessment rolls of townships in which the lands here involved were situated any error in the arrangement of the lands was made.

The fourth specification of defects, quoted above, to the effect that the lands were not assessed to the railroad company, is sufficiently answered by the quotation of section 1641 of the Compiled Laws of Dakota of 1887:

> "The sale of lands, town or city lots or any other real property shall not be invalid on account of such real property having been listed, or charged on the duplicate in any other name than that of the rightful owner." * * *

As to the fifth specification of defects, failure to name road and school districts, it need only be said that the complaint fails to allege that any road or school districts existed in Richland county. Some counties of Dakota were in 1888 organized under what was called the township system, others were not. In counties organized under the township system there were no school districts or road districts.

Section 1243, Compiled Laws of Dakota, 1887, reads as follows:

> "At the annual meeting of the county commissioners * * * it shall be the duty of the board * * * to apportion their respective counties into one or more road districts, *where such county is not at present formed into townships.*" * * *

Compiled Laws of Dakota, 1887, Political Code, chapter 17, article 5, note by compilers:

> "There are two systems of school government in vogue in the Territory, one known as the school township system, and the other as the school district system. * * * All those counties having the school district system in force shall be governed by chapter, etc., * * * and * * * said chapter is hereby revived and made of full force and effect so far as it relates to counties excepted from the operation of the school township system."

The provision of law requiring the assessment rolls to show the number of the road and school district in which each piece of property was situate was part of the old code of 1877, when there was no township system. Of course, in counties where every township had it own separate assessment roll, the provision was obsolete. The bill does not indeed state that Richland county was organized under the township system, but it does not state the contrary, and from the mention of township assessment rolls it would seem that the county was so organized.

It is not alleged that by reason of any or all the irregularities or defects complained of the appellants have been required to bear more than their fair share of the public burden.

State Railroad Tax Cases, 2 Otto, 575;
Bank *v.* Perea, 147 U. S., 87.

EDGAR W. CAMP,
Solicitor for Respondents.

Dated Nov. 1, 1897.